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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 359

GREDE FOUNDRIES, INC., IRON MOUNTAIN DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 187) is reported at 189 F. 2d 258. The decision and order of the Board (R. 38-41) are reported at 83 NLRB 201. The decision and direction of the Board in the prior representation proceeding (R. 72-81) are reported at 76 NLRB 1246.

JURISDICTION

The judgment of the court below was entered on May 2, 1951 (R. 187). By order of Mr. Justice

Burton, dated June 29, 1951, the time for filing a petition for a writ of certiorari was extended to and including September 29, 1951 (R. 218). The petition for a writ of certiorari was filed on September 28, 1951. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as originally enacted (49 Stat. 449, 29 U. S. C., 151 *et seq.*), and as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV., 141 *et seq.*), and of the Rules and Regulations and the Statement of Procedure of the National Labor Relations Board, Series 4 (29 C. F. R., 1946 Supp., § 202.1, *et seq.*), are set forth in the Appendix to the petition, pp. 101-103, as supplemented by Appendix A of this brief, *infra,* pp. 17-23.

QUESTIONS PRESENTED

1. Whether the Board and the court below erred in holding that the regional director had not abused his discretion to order a prehearing election under the Wagner Act where the parties had raised no substantial issues requiring prior determination by the Board.

2. Whether the Board was required to treat as nullities the results of its election and hearing concluded prior to the Taft-Hartley Act and to

conduct a new hearing and election in accordance with the procedures under the amended Act before certifying a representative for petitioner's employees.

3. Whether the Board acted arbitrarily and capriciously in refusing to reject the otherwise valid ballot of an employee who had voted in the election because that employee left his job some two months after the election but before the final tally of the ballots.

4. Whether petitioner, having failed to raise before the Board or the court below, prior to the entry of a final decree and expiration of the time in which to seek rehearing, the contention that the Board's certification and order were invalid because the parent federation of the charging union had not filed non-Communist affidavits during the period the proceedings were pending before the Board, is entitled to review of this contention by this Court.

STATEMENT

This case arises out of petitioner's refusal to bargain with the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America (U.A.W.-C.I.O.), herein called the Union, following the Board's certification of the Union as the exclusive representative of petitioner's employees at its Kingsford, Michigan, plant. The facts may be summarized as follows:

A. *The proceedings before the Board*

On May 9, 1947, the Union initiated representation proceedings before the Board by filing a petition for certification of representatives (R. 72; 61-62). In accordance with the Board's usual procedure, the regional director conducted a preliminary investigation to ascertain the positions of the parties. Concluding that no serious dispute existed as to the scope of the unit, the regional director, on June 17, 1947, directed that a prehearing election be held on June 24, as provided for in the Board's Rules and Regulations and Statement of Procedure then in effect (R. 72; 165-166; Pet. p. 103; *infra,* p. 21). In a letter accompanying the notice of election, he advised petitioner that the election was "of course, without prejudice to your right to hearing * * * before final determination of the question concerning representation" (R. 165).

At the election, in conformity with the regional director's tentative unit description,[1] the Board's

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[1] In the notice of election, the voting unit was described as "all production and maintenance employees," excluding "office and clerical employees, watchmen, and supervisory employees" (R. 167). This description accorded substantially with the expressed position of petitioner, in that it excluded watchmen, clerical, and supervisory employees (R. 177). Although petitioner had also desired to exclude janitors, timekeepers, shop clerks, stock clerks and supervisory inspectors, there were no employees then working in such distinct job categories (R. 76; 155-159, 177, 182, 185-186). In addition, petitioner had originally urged that a shipping clerk and a maintenance employee be excluded from the unit, but petitioner apparently

field examiner excluded the watchmen employed by petitioner from the list of eligible voters. No objection to this ruling was then raised by either petitioner, the Union, or the employees themselves (R. 89, 105-106, 169, 181). The Union challenged the eligibility to vote of two employees, and petitioner challenged St. Arnauld, a pattern storage clerk, and another employee (R. 79; 113, 124, 152, 161-162). When the tally of ballots showed that of 72 employees who had voted, 35 had cast their ballots for the Union and 33 against (R. 73; 62-63), it became necessary to determine the validity of the four challenged ballots to decide the outcome of the election.

On July 9, 1947, a post-election hearing was held "for the express purpose of affording to the parties an opportunity to state their views with respect to any issues between them, and to supply the evidence necessary for resolution by the Board of all such issues" (R. 73). At the hearing petitioner, for the first time, contended that the watchmen should have been included in the unit and permitted to vote (R. 105, 181). In addition, petitioner introduced evidence on all issues which it then considered relevant, and upon conclusion of the hearing the case was referred to the Board for decision.

Subsequent to the hearing, and before issuance

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abandoned this contention at the time of the election, since it did not challenge the ballot of either employee (R. 75-76; 149, 152, 161, 162, 177).

of the Board's decision, petitioner on March 10, 1948, advised the Board that St. Arnauld had resigned in August 1947, and that although the total number of employees had remained fairly constant, there had been a personnel turnover of approximately 25 percent since the election (R. 77; 71-72, 65). Shortly thereafter, petitioner moved that the Board dismiss the petition on the grounds that (1) the intervening effective date of the amendments to the Act rendered the holding of the prehearing election unlawful and (2) because of the lapse of time since the election "a certification at this late date would not represent the desires of the employees" (R. 65). On April 8, 1948, the Board issued its decision and direction (R. 72-81), finding that the appropriate bargaining unit was substantially the same as that described by the regional director and concluding that the contentions raised by petitioner did not warrant vacating the proceedings. The Board also found that three of the four employees whose ballots had been challenged, including St. Arnauld, were eligible to vote, and directed that their ballots be opened and counted (R. 79-81). The final tally of ballots, including those three, showed that of a total of 71 valid ballots, 36 were cast for, and 35 against, the Union (R. 95). Accordingly, on May 20, 1948, the Board, in a supplemental decision and certification, certified the Union as the exclusive representative of petitioner's employees (R. 95-96).

Following the issuance of the certification the Union requested petitioner to bargain with it and petitioner refused (R. 25-26; 58-59). Thereafter, the usual proceedings under Section 10 of the Act were instituted, at the conclusion of which the Board found that petitioner had violated Section 8 (a) (1) and (5) of the Act by its refusal to bargain (R. 38; 14-31, 42). Accordingly, petitioner was ordered to cease and desist from engaging in further similar unfair labor practices and to bargain with the Union on request (R. 39-40).

B. *Proceedings in the court below*

Petitioner having failed to comply with the Board's order, the Board, on July 31, 1950, instituted in the court below the usual enforcement proceedings under Section 10 (e) of the Act (R. 1-5). On May 2, 1951, the court issued a *per curiam* opinion and entered a judgment enforcing the Board's order in full (R. 187).

On June 20, 1951, after expiration of the time in which to petition for rehearing, petitioner filed in the court below a motion for vacation of the court's judgment (R. 192-195). Posing issues which had never theretofore been presented either to the Board or to the court (Pet. 8, R. 194), petitioner asserted in support of its motion to vacate that the Board's order was invalid because the officers of the C.I.O. had not filed the non-Communist affidavits required by Section 9 (h) of the Act until

after the Board's certification and complaint were issued (R. 193-194). This motion, which presents the question whether the court below was "without jurisdiction to enforce an invalid order of the * * * Board" (R. 195), is still pending.

ARGUMENT

1. Petitioner's contention (Pet. 2, 9-11) that the regional director abused his discretion in applying the Board's Rules and Regulations under the Wagner Act by conducting a prehearing election in the circumstances of this case is neither important nor meritorious. As petitioner insists (Pet. 12),[2] the prehearing election procedure no longer exists under the amended Act, so that questions of the scope of a regional director's discretion to employ this procedure under the original Act are of no general significance today. But even apart from this consideration and apart from the fact that the decision below is clearly correct,[3] there would be no warrant for review of the question whether the regional director properly exercised

[2] See National Labor Relations Board Thirteenth Annual Report, p. 20 (1948).

[3] The Board's Statement of Procedure (*infra*, p. 21), upon which petitioner relies in attacking the regional director's decision to conduct a prehearing election, did not require that the parties be in full accord before such an election could be held, but only that there be "no issues *of such substance to require final decision by the Board* before a proper election may be held". (Emphasis added.) Without unnecessarily extending this discussion by detailing the character of the "issues" which petitioner merely states to support its position (Pet. 9), we submit that the record fully sustains the regional director, the Board, and the court below in the conclusion that these issues were insubstantial.

his discretion in concluding that no substantial issue precluded his direction of the election prior to the hearing. For it is clear that appraisal of the propriety of the regional director's action turns on the circumstances of this particular case and that review by this Court of this factual inquiry, following the concurrent determinations of the Board and the court below, would be inappropriate.

It is equally clear that the essentially factual holding of the court below presents no conflict with any other decision. As we show in the note below,[4]

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[4] *National Labor Relations Board* v. *Evans & Son*, 181 F. 2d 427 (C. A. 3), merely held, on the facts there presented, that a regional director had abused his discretion in ordering a prehearing election—a holding in no way inconsistent with the view that, on the facts of *this* case, there was no such abuse. Petitioner's reference (Pet. 10) to *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, is even wider of the mark; there is no doubt here that, as it pointed out in its decision (R. 73), the Board exercised its "responsibility of determining the appropriate group of employees for the bargaining unit" (313 U. S., at 152) and that "Certification of the bargaining representative follow[ed] the determination of the appropriate unit" (*id.*, at 156). *Marshall Field & Co.* v. *National Labor Relations Board*, 135 F. 2d 391 (C. A. 7), which held—with Judge (now Mr. Justice) Minton dissenting—that "The Board should have decided upon the unit * * * before it called an election" (135 F. 2d, at 393) scarcely advances petitioner's attack upon the prehearing election in this case in view of this Court's subsequent ruling that "nothing in [Section 9] purports to require a hearing before an election." *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 707. This same ruling demonstrates, finally, the futility of petitioner's reliance upon the statement in *May Dept. Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 381, that "The Board directs what names go on the ballot." Having conceded (R. 90), as it had to, that the prehearing election procedure was permissible under the original Act, petitioner is left with no basis for its attempt

the decisions petitioner cites as conflicting are either wholly consistent with, or irrelevant to, the decision below.

2. Applying settled and plainly apposite principles of construction, the courts of appeals have consistently rejected suggestions that the amendments effected by the Taft-Hartley Act were intended to nullify procedural steps completed by the Board under the Wagner Act prior to the effective date of Taft-Hartley.[5] The numerous and uniform contrary decisions demonstrate the baselessness of petitioner's contention (which, like the one discussed above, is no longer of material im-

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to suggest that the procedure was actually improper in every case because it omitted pre-election directions by "the Board" as to "what names go on the ballot."

[5] *National Labor Relations Board* v. *Quest-Shon Mark Brassiere Co.*, 185 F. 2d 285 (C. A. 2), certiorari denied, October 8, 1951; *National Labor Relations Board* v. *Geraldine Novelty Co.*, 173 F. 2d 14, 18 (C. A. 2); *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 662 (C. A. 2); *National Labor Relations Board* v. *Brozen*, 166 F. 2d 812, 813 (C. A. 2); *National Labor Relations Board* v. *Clark*, 176 F. 2d 341, 343 (C. A. 3); *Joanna Cotton Mills* v. *National Labor Relations Board*, 176 F. 2d 749, 754 (C. A. 4); *National Labor Relations Board* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506-507 (C. A. 5); *National Labor Relations Board* v. *Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. A. 5); *National Labor Relations Board* v. *Carolina Mills*, 167 F. 2d 212, 214 (C. A. 5); *National Labor Relations Board* v. *Mylan-Sparta Co.*, 166 F. 2d 485 (C. A. 6); *National Labor Relations Board* v. *Whittenberg*, 165 F. 2d 102, 104 (C. A. 5); *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 236-238 (C. A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, 180 F. 2d 68, 71-72 (C. A. 10). See also, Sutherland, *Statutory Construction*, Vol. 1, Section 1935, n. 13, p. 434 (3d ed., 1943). Compare Section 12 of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1011, and Rule 86, Federal Rules of Civil Procedure.

portance in the administration of the Act) that the Board should have scrapped the results of its election and hearing concluded prior to Taft-Hartley and should have conducted a new hearing and election under the procedures of the amended Act before certifying a representative for petitioner's employees.

3. Equally without merit is petitioner's argument (Pet. 3, 12-13) that the Board acted arbitrarily and capriciously in counting the ballot of an employee who left petitioner's employ about two months after the election but eight months before the tally was made. As this Court pointed out in *National Labor Relations Board* v. *Tower Co.*, 329 U. S. 324, 331, practical implementation of the "principle of majority rule" requires that the eligibility of voters be determined at or before the time of an election. To hold that a valid ballot cast by an eligible employee must be discarded because the employee subsequently terminates his employment would require "the holding of constant and repeated elections [which] is quite impracticable." *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 221 (C. A. 4). And so the courts, recognizing that "the certification reports the will of the majority as of the day of the election but * * * necessarily does not issue until * * * perhaps weeks or months later" (*ibid.*), have repeatedly held that the votes of employees who leave their jobs be-

tween election and certification may properly be counted in determining a majority representative.[6] Petitioner suggests no ground for applying a contrary, wholly unworkable rule to this case.[7]

Nor is petitioner's position strengthened by the suggestion (advanced in argument, Pet. 12-13, though not posed as a question presented) that the Board should have considered its election void because there had been a turnover of some 25 percent among petitioner's employees between the time of the election and the certification. This variant of the argument respecting the single employee who left his job after the election is clearly erroneous for the reasons we have already stated. Indeed, since petitioner has not shown that the changes in its personnel effected a change in the proportion favoring representation by the Union, its contention amounts to nothing more than a clearly unfounded claim that the Board's pro-

[6] See *National Labor Relations Board* v. *Calumet Steel*, 121 F. 2d 366, 370 (C.A. 7); *National Labor Relations Board* v. *Worcester Woolen Mills*, 170 F. 2d 13, 17 (C. A. 1), certiorari denied, 336 U. S. 903; *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755, 758-759 (C. A. 4).

[7] While it mentions in its argument (Pet. 12) the fact that it unsuccessfully challenged the ballot of the employee whose subsequent termination of his employment it now invokes to attack the Board's certification, petitioner neither does nor could argue that this challenge would warrant departure from the rule that a valid ballot of an eligible employee is not invalidated by the employee's change of status after the election. Having abandoned its contention that the challenged ballot was improper at the time of the election, petitioner has no basis for arguing that this ballot should be treated differently from any other for any purpose.

cesses must regularly be nullified by the normal circumstance of employee turnover.[8]

4. Petitioner's remaining contention—that the Board's order should not have been enforced because the certification and the complaint were issued before execution of non-Communist affidavits by the officers of the C.I.O. (Pet. 11)—was, as petitioner acknowledges (Pet. 8), never raised before the Board or before the court below until after entry of the court's decree and expiration of the time in which to seek rehearing. Although petitioner has filed with the court below a motion to vacate its judgment, it is clear that this belated effort does not affect the finality of that judgment[9] and the ap-

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[8] See *National Labor Relations Board* v. *Worcester Woolen Mills, supra,* at 17; *National Labor Relations Board* v. *National Plastic Products Co., supra,* at 759; *International Assn. of Machinists* v. *National Labor Relations Board,* 110 F. 2d 29, 33 (C. A. D. C.), affirmed, 311 U. S. 72; *National Labor Relations Board* v. *Highland Park Mfg. Co.,* 110 F. 2d 632, 640 (C. A. 4); *National Labor Relations Board* v. *Grieder Machine Tool & Die Co.,* 142 F. 2d 163, 165 (C. A. 6), certiorari denied, 323 U. S. 724; *National Labor Relations Board* v. *Botany Worsted Mills,* 133 F. 2d 876, 881 (C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Appalachian Electric Power Co.,* 140 F. 2d 217, 220-222 (C. A. 4); *Valley Mould & Iron Corp.* v. *National Labor Relations Board,* 116 F. 2d 760, 764-765 (C. A. 7), certiorari denied, 313 U. S. 590; *National Labor Relations Board* v. *Century Oxford Mfg. Corp.,* 140 F. 2d 541, 542-543 (C. A. 2), certiorari denied, 323 U. S. 714; *National Labor Relations Board* v. *Blair Quarries, Inc.,* 152 F. 2d 25, 26 (C. A. 4); see also, *National Labor Relations Board* v. *Geraldine Novelty Co.,* 173 F. 2d 14, 16-18 (C. A. 2).

[9] The filing of a motion to vacate the decree does not affect its finality, for ". . . finality is not deferred by the existence of a latent power in the rendering court to reopen or

plicability here of the rule that certiorari will not be granted to review a question "not properly raised, litigated or passed upon below." *McCullough* v. *Kammerer Corp.*, 323 U. S. 327, 328. See also *Marshall Field & Co.* v. *National Labor Relations Board* 318 U. S. 253; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385. For the motion to vacate necessarily raises a new, narrower issue, the lower court's resolution of which may itself afford a basis for seeking review by this Court. Cf. *Swift & Co.* v. *United States,* 276 U. S. 311.[10] It does not cure retroactively petitioner's failure to present to the Board or the court below the question it now poses in its application for review of the present judgment.

In any event, this question is completely disposed of by a recent amendment to the National Labor Act, approved October 22, 1951. See Appendix B, *infra,* pp. 23-25.[11] In this amendment, Congress provided that certifications issued while the C.I.O.

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revise its judgment." *Market St. Ry. Co.* v. *Railroad Commission of California,* 324 U. S. 548, 551.

[10] Obviously petitioner cannot succeed in its motion below merely by showing that the question it failed to raise before judgment is one on which it could have prevailed. For the motion to vacate can serve in a case of this kind, not as a rescue device for reviving issues closed by a final decree, but only as a means of securing relief from a judgment which exceeded "the power of the court to adjudicate between the parties." *Swift & Co.* v. *United States, supra,* at 327.

[11] The amendment was passed by the Congress on October 9, 1951 (97 Daily Cong. Rec. 13122-13127), and signed by the President on October 22, 1951 (Pub. Law 189, October 22, 1951, 82nd Cong., 1st Sess.).

was not in compliance with Section 9 (f), (g), and (h), should not be deemed invalid. After stating in a proviso that persons who failed to honor such certifications should not be held liable therefor, Congress added a further proviso (*infra*, p. 24) declaring that this exemption should not apply in cases where liability had already been imposed by final court decree. Congress thereby precluded efforts like petitioner's to have the courts "excuse disobedience to court judgments and court decrees which became final prior to the date" of the enactment of the amendment.[12]

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[12] H. Rep. No. 1082, 82nd Cong., 1st Session., p. 2; see also, S. Rep. No. 646, 82nd Cong., 1st Sess., p. 2.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER, 1951.

APPENDIX A

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, 141 *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also, have the right to refrain from any or all of such activities * * * .

UNFAIR LABOR PRACTICES

SEC. 8. (a) *It shall be an unfair labor practice for an employer*—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * * (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a). * * *.

REPRESENTATIVES AND ELECTIONS

SEC. 9. (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not * * * (3) decide that any

unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; * * *

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(b) Whenever it is charged that any person

has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency at a place therein fixed, not less than five days after the serving of said complaint:* * *
Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 732-B, 723-C).

(c) The testimony taken by such members, agent or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleading and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleading, testimony, and proceedings set forth in such transcript a decree of enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

2. The relevant provisions of the National Labor Relations Act before amendment (Act of July 5,

1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.
>
> * * * * *

Rules and regulations of the National Labor Relations Board, series 4 (29 C. F. R., 1946 Supp., § 202.1 *et seq.*):

> SEC. 203.49 *Investigation of petition by Regional Director; notice of hearing; service of notice; withdrawal of notice.*—After a petition has been filed, if no agreement such as that provided in section 203.48 is entered into and if it appears to the Regional Director that the policies of the act will be effectuated and that (if the petiton is filed by a labor organization), there is reasonable probability that an investigation will result in a free choice by employees of a bona fide representative, he shall institute such investigation: * * *.[1]
>
> STATEMENT OF PROCEDURE
>
> * * * * *
>
> SEC. 202.18 *Formal hearing.*—If no informal adjustment of the question concerning

[1] At any stage of the investigation, either before hearing or after the hearing but before transfer of the case to Board, the Regional Director may in cases which present no substantial issues, conduct a secret ballot of the employees, or he may decline to continue the investigation.

representation has been effected, the Regional Director will recommend that formal procedures be taken. These may take the form of either (a) an immediate election followed by a hearing, if the case presents no issues of such substance as to require final decision by the Board before a proper election may be held, or (b) a hearing followed by Board determination of the issues and, if appropriate, an election. * * *

SEC. 202.19 *Procedures respecting elections conducted before hearing.*—(a) If the Regional Office determines that the case is an appropriate one for election before formal hearing, an election is conducted as quickly as possible among the employees, the rights of all parties, however, being preserved by opportunity for appropriate challenges and objections to the conduct of the election, and for full hearing after the election. If the election shows that a representative has been selected and no objections are filed by any party, the employer may recognize such representative by entering into a recognition agreement or a stipulation for Board certification after election. Both of these forms are available upon request to the Regional Offices. If objections are filed or if for any other reason the employer does not choose to terminate the case by either of the above informal adjustments, the Regional Director will issue a notice of hearing. At this hearing, conducted before a hearing officer who is usually an attorney or field examiner attached to the Regional Office

but who may also be another qualified official, all issues, including issues with respect to the conduct of the election and challenged ballots, are fully heard. Following the hearing, the hearing officer submits an informal analysis to the Board.

* * * * *

APPENDIX B

Public Law 189, 82d Cong., 1st Sess., October 22, 1951, provides as follows:

AN ACT

To amend the National Labor Relations Act, as amended, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the National Labor Relations Act, as amended, is hereby further amended as follows:

(a) By adding at the end of said Act the following new section:

"SEC. 18. No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 9 of the National Labor Relations Act, as amended, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 9 (f) (g), or (h) of the aforesaid

Act prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have complied with the provisions of section 9 (f), (g), or (h) of the aforesaid Act prior to November 7, 1947: *Provided,* That no liability shall be imposed under any provision of this Act upon any person for failure to honor any election or certificate referred to above, prior to the effective date of this amendment: *Provided, however,* That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 10 (e) or (f) and which have become final."

(b) Subsection (a) (3) of section 8 of said Act is amended by striking out so much of the first sentence as reads " ; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:" and inserting in lieu thereof the following: "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the author-

ity of such labor organization to make such an agreement:"

(c) Section 9 (e) of such Act is amended by striking out all of subsections (1) and (2) and inserting in lieu thereof the following: "(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer." Renumber subsection "(3)" as "(2)".

(d) Subsections (f), (g), and (h), of section 9 of such Act are amended by striking out the words "No petition under section 9 (e) (1) shall be entertained," where they appear in each of such subsections.

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COPY ROBERTSON AND HOEBRECKX

November 7, 1951

No. 353

Office-Supreme Court, U. S.
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CHARLES

Mr. John W. Menzies, Esq.
Clerk, United States Court of Appeals
for the Sixth Circuit
Cincinnati 2, Ohio

Dear Sir:

Re: National Labor Relations Board v. Grede Foundries, Inc.
No. 11,218

The undersigned has received a copy of a letter addressed to you, dated October 30, 1951, from the Assistant General Counsel of the National Labor Relations Board, asserting that the recently passed amendment to the National Labor Relations Act requires that Respondent's motion to vacate, now pending before the Court, be dismissed. Respondent contests this assertion.

Under date of June 26, Respondent filed with the Clerk of the United States Supreme Court, a petition for extension of time to file a petition for a writ of certiorari in this matter; and the Hon. Harold H. Burton, Associate Justice of the Supreme Court of the United States, on June 29, 1951, by order extended the time to September 29, 1951.

Under date of September 26, 1951, Respondent herein filed a petition for writ of certiorari with the Supreme Court of the United States, requesting that Court to review this Court's judgment of May 12, 1951, and also the issue raised in Respondent's motion to vacate.

Respondent's motion to vacate was based upon the assertion that the Board's order and this Court's judgment were invalid because, at the time the complaint was issued, the national officers of the CIO were not in compliance with the non-Communist affidavit requirements of the Act. Congress, in the October 22, 1951 amendment, did not change the prohibition against the issuance of complaints based on charges filed by labor organizations which had failed to file non-Communist affidavits. Section 18 of the amendment legalized certain previous acts the Board had taken in connection with representation cases, and referred to unfair labor practice cases only in the two provisos contained therein.

These provisos are as follows:

"Provided, That no liability shall be imposed under any provision of this Act upon any person for failure to honor any election or certificate referred to above, prior to the effective date of this amendment; Provided, however, That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 10(e) or (f) and which have become final." (Emphasis ours)

Clearly, under the first proviso, this Court would have no alternative but to grant Respondent's motion to dismiss. The issue here presented is whether the judgment of this Court is one which became final prior to October 22, 1951, the day on which the amendment became effective.

The case cited by the Board in its letter of October 30--Market Street Railway Co. v. Railway Commission of Calif., 324 US 518, 551--is not in point. The issue therewas: When did a state court's judgment become "final" for purposes of review by the United States Supreme Court. (See Headnote 2, P. 548).

"The judgment for ourpurposes is final when the issues are adjudged." (P. 551) (Emphasis ours)

The Court, however, did indicate clearly that a judgment is not final if it is subject to further review. The Court stated that a judgment, to be final, "must be the final word of a final court." A Circuit Court of Appeals is not a "final court" in the Federal Judicial system.

Section 18 of the amendment prohibits the setting aside of judgments "which have become final." If the Congress intended that every judgment rendered by a Circuit Court under Sections 10(e) or 10(f) was to remain undisturbed, regardless of whether or not an appeal therefrom was pending, the language "and whihh have become final" would have been omitted. The judgment of a Circuit Court of Appeals which, prior to the effective date of the Act, was made the subject of a timely petition for a writ of certiorari does not become final until the Supreme Court of the United States acts upon the petition. The Congress, by instituting the additional language, anticipated the situation here involved.

Section 10(e) of the National Labor Relations Act provides in part as follows:

"...The jurisdiction of the court shall be conclusive and its judgment and decree shall be final, except that the same shall be subject to review....by the Supreme Court of the United States upon writ of certiorari or certification..."

Thus, the Act specifically provides that the exception to the finality of a Circuit Court's judgment arises in a case where the judgment is made subject to review by the United States Supreme Court in a petition for a writ of certiorari.

It is, therefore, submitted that the second proviso of Section 18 has no application in the instant case, and that the first proviso of Section 18 requires that Respondent's motion to vacate this Court's judgment be granted.

It will be greatly appreciated if you will submit this letter to the Court at the same time you submit the Board's letter of October 30, 1951.

Respectfully yours,

ROBERTSON AND HOEBRECKX

By
O. S. Hoebreckx, Counsel for
Grede Foundries, Inc.

OSH/gll
cc: Mr. A. Norman Somers
Assistant General Counsel
National Labor Relations Board
Washington 25, D. C.